82-2052

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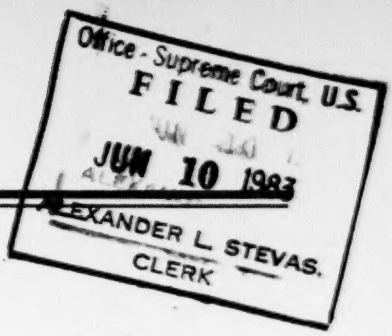

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AUDREY DEFEX,

Petitioner,

—against—

PAN AMERICAN WORLD AIRWAYS, INC. & INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACK B. SOLERWITZ, ESQ.*
SOLERWITZ, SOLERWITZ & LEEDS, ESQS.
Attorneys for Petitioner
Office & P.O. Address
170 Old Country Road
Mineola, NY 11501
(516) 742-4300

**Counsel of Record*

QUESTION PRESENTED

Was the petitioner denied her due process rights when the court granted summary judgment to the respondents while there were still genuine issues of fact to be decided.

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TABLE OF AUTHORITIES

IN THE

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OCTOBER TERM, 1982

AUDREY DEFEX,

Petitioner,

—against—

PAN AMERICAN WORLD AIRWAYS, INC. & INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE & ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

AUDREY DEFEX, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on March 14, 1983.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Second Circuit, Docket No. 82-7686 (2nd Cir. 1983) is printed in Appendix A hereto, infra, page 1a. The Judgment of the United States District Court for the Eastern District of New York is printed in Appendix A, infra, page 4a.

JURISDICTION

The judgment of the United States Court of Appeals For The Second Circuit (Appendix A, *infra,* page 1a) was entered on March 14, 1983. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner, a former employee of Pan American World Airways, Inc. (hereinafter referred to as "Pan Am") sought judicial review of her discharge from employment.

On or about October 7, 1980, petitioner, while working for Pan Am, sent in a letter of resignation. Subsequently, petitioner sought to rescind her resignation and sought the aid of her chief steward and business representative for International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 732 (hereinafter referred to as "IBT"). Petitioner's supervisor refused to rescind petitioner's resignation; however, petitioner was sent to a trained counselor on staff for an interview and petitioner agreed to a medical leave of absence which commenced on November 12, 1980. Petitioner had been suffering from a hand infection and was under her doctor's care and treatment.

Thereafter, petitioner received a letter dated December 4, 1980 from the staff counselor setting forth conditions as to petitioner's medical leave of absence. The letter dated December 4, 1980 required the petitioner to receive a specialist's certification in areas of skin rash condition and stress reaction.

Petitioner stated that she gave this letter of December 4, 1980 and the copy thereof dated January 27, 1981 to the chief steward of her union and requested that he continue her grievance. Petitioner also left a copy of the letter dated December 4, 1980 with the office of her union representative and with the officer of IBT, Local 732. Petitioner claimed that she was uncertain as to whether the union would file a new grievance or whether they would merge the new grievance as a continuation of her prior grievance. Petitioner claims that she was under the impression that respondent IBT would have filed her grievance.

Petitioner received a letter dated July 10, 1981, which set forth that petitioner would be unable to return from her

extended medical leave of absence unless she had received treatment for her conditions. Respondent Pan Am refused to accept the notes from petitioner's doctor with regard to her ability to return to work.

On or about July 22, 1981, petitioner instituted this action alleging that she was wrongfully discharged by respondent, Pan American World Airways, Inc. and that respondent International Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers of America, failed to represent her properly in her dispute with her employer. Respondents moved to dismiss the complaint and for summary judgment on the ground that petitioner failed to exhaust the mandatory grievance procedure established in the collective bargaining agreement between IBT and Pan Am. Petitioner opposed this motion. Judgment was entered after a hearing, for respondents dismissing the complaint and in favor of petitioner and against IBT, in the sum of $500.00 on August 12, 1982, pursuant to a memorandum and order by Judge Pratt granting respondents' motions for summary judgment dismissing the complaint. Petitioner appealed to the United States Court of Appeals for the Second Circuit which affirmed the judgment of the District Court, finding that court properly granted summary judgment where no issue of material fact remained.

REASONS FOR GRANTING THE WRIT

Petitioner was a permanent employee of Pan American and had a property interest in her job. Moreover, petitioner was denied the right to a jury trial since the district court granted respondents' motions for summary judgment on the ground that petitioner failed to exhaust the mandatory grievance procedure established in the collective bargaining agreement between IBT and Pan Am.

The District Court below recognized that the defense of non-exhaustion would not bar petitioner's suit against either the union or her employer if petitioner had reasonably relied upon the union to prosecute her grievance. *Schum v. South*

Buffalo Railway Co., 407 F.2d 328, 332 (CA 1974). The respondents' motions for summary judgment must demonstrate beyond a reasonable doubt that there is no issue of fact for trial. All inferences must be drawn against the movant. *Adikes v. Kress*, 398 U.S. 144, 157 (1970); *U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *Conley v. Gibson*, 355 U.S. 41 (1965).

The District Court set the matter down for a hearing on the sole issue as to whether the petitioner reasonably relied on the union to prosecute her grievance.

Under the Federal Rules of Civil Procedure, summary judgment is appropriate only where "there is no genuine issue as to any material fact." Federal Rules of Civil Procedure p. 56(c). It has been held that cases in which the underlying issue is one of motive or intent are particularly inappropriate for summary judgment. See *Egger v. Phillips*, 699 F.2d 497 (7th Cir. 1982), *citing Baldwin v. Local Union No. 1095*, 581 F.2d 145, 151 (7th Cir. 1978). The Seventh Circuit stated in *Egger, supra*, that "(a) determination involving a person's state of mind is seldom susceptible to direct proof, but must be inferred from circumstantial evidence."

This is especially true where dismissal is sought in cases concerning a union's duty of fair representation. *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970). Pursuant to the Railway Labor Act (RLA), IBT owed petitioner a duty of fair representation. *See Corbin v. Pan Am*, 432 F.Supp. 939, 943 (N.D. Cal. 1977). Even a full presentation of a medically related grievance, but in a perfunctory way, may amount to a violation. *Curtis v. United Transportation Union*, 486 F.Supp. 966, 970 (E.D. Ark. 1980). The Supreme Court of the United States has held that a claim against a union for breach of its duty of fair representation is a discrete claim to be adjudicated in the District Court. *Czosek v. O'Mara*, 397 U.S. 25, 28, 90 S.Ct. 770, 772 (1970). Significantly, *Czosek* (which arose in the Second Circuit) concerned a union failure to process claims, which is the claimed breach in the instant case. *See Pratt v. United Airlines*, 468 F.Supp. 508, 510 fn. 4 (N.D. Cal. 1978).

In *Schum v. South Buffalo,* 496 F.2d 328 (2nd Cir. 1974), a former employer sued both company and union for refusing to allow him to return to work on medical grounds and violation of the duty of fair representation.

The Second Circuit reviewed the history of the RLA in some detail, including the doctrine of *Vaca v. Sipes,* 386 U.S. 171 (1967), excusing non-exhaustion of contractual or administrative remedies in a violation of duty of fair representation situation. The Second Circuit then squarely held:

> ". . . it seems clear that *Maddox* [Republic Steel v. Maddox, 397 U.S. 650 (1965)], *Vaca* and *Glover* provide ample legal bases upon which *Schum* would have viable causes of action against both his union and his employer."

Schum v. South Buffalo, supra, 496 F.2d at 331.

Significantly, there was no allegation in *Schum* that the company and the union were in collusion. The only factual predicate required, was Schum's reasonable reliance upon the union to prosecute his grievance. 496 F.2d at 332.

Schum is controlling case law in the Second Circuit. It has been adopted by the Seventh, District of Columbia, and Ninth Circuits. *Pratt v. United Air Lines,* 468 F.Supp. 508, 512 (N.D. Cal. 1978). In its consideration of this area, a court in the Eighth Circuit, as well, adopted the rule of *Schum. Riddle v. TWA,* 512 F.Supp. 75, 78 (W.D. 1981).

After the limited hearing, the District Court found that the petitioner had not reasonably relied on the Union to prosecute a grievance on her behalf and granted respondents' motions for summary judgment. The Court of Appeals affirmed this judgment based upon its finding that petitioner failed to adduce credible evidence of reasonable reliance.

However, a review of the record reveals that petitioner set forth sufficient evidence to justify a denial of respondents' motions for summary judgment. The petitioner testified at the hearing that she gave a copy of the letter dated December 4, 1980 to the chief steward of her union and to a union officer

because she wanted to grieve this matter. Petitioner further testified that she was under the impression that the union might have merged her grievance with a prior grievance that she believed to be pending. Petitioner also brought the aggrieved letter to workmen's compensation in order to protect herself.

The chief steward of petitioner's union testified on cross-examination that if petitioner had filed a grievance in January, 1981, then it would not be necessary for her to file another grievance as to any letters received after January 1981 because there would have been an existing grievance. This testimony supports the petitioner's position that she believed that the union might have merged her grievance of the letter dated December 4, 1980 with her prior grievance.

The courts below did not draw inferences against the respondents (who were the movants for summary judgment) as required by law. Although there was sufficient credible evidence adduced upon the record to support the finding that petitioner reasonably relied upon the union to prosecute her grievance, the courts below granted summary judgment to respondents.

Based on the foregoing, the court below erred in granting summary judgment to the respondents. In the instant case, the courts below improperly drew inferences against petitioner, thus depriving petitioner of due process.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

JACK B. SOLERWITZ, ESQ.*
SOLERWITZ, SOLERWITZ & LEEDS, ESQS.
Attorneys for Petitioner
Office & P.O. Address
170 Old Country Road
Mineola, NY 11501
(516) 742-4300

**Counsel of Record*

APPENDIX

Opinion and Judgment of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

82-7686

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of March, one thousand nine hundred and eighty-three.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE AMALYA L. KEARSE,
Circuit Judges.

HONORABLE LLOYD F. MACMAHON,
District Judge,
sitting by designation.

AUDREY DEFEX,
Plaintiff-Appellant,

—against—

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

PAN AMERICAN WORLD AIRWAYS, INC. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. On motions for summary judgment made by Pan American and the Union, Judge Pratt granted a hearing on what appeared to be a contested issue. After the hearing he found that Defex had not reasonably relied on the Union to prosecute a grievance on her behalf and granted the motions for summary judgment. Our review of the district court's factual finding is especially circumscribed where, as in this case, the district court renders its decision after a resolution of credibility and the weight to be accorded witness testimony. *E.g., Rolf* v. *Blyth, Eastman Dillon & Co.*, 570 F.2d 38 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978).

2. A substantial basis existed for Judge Pratt's decision. Appellant testified to her familiarity with grievance procedures, and had employed the proper approach in the past. She conceded that not having filed grievance papers in this case was "unusual," and was able to offer no explanation of substance for this omission. Moreover, Defex admits she hoped to receive disability payments and she appears to have conceded this was the reason she did not pursue the normal grievance procedures.

3. Appellant's brief in this court advances a different reading of the hearing testimony than that adopted by Judge Pratt, but we are not permitted to substitute the conclusion urged upon us by appellant for the one reached by the district court, which found substantial support in the record.

4. Moreover, Defex had a full and fair opportunity at the hearing to rebut the allegation that there was no genuine issue of material fact for trial. Because appellant failed to adduce credible evidence of reasonable reliance, *see Ithaca College* v. *NLRB*, 623 F.2d 224, 229 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980), and therefore no issue of material fact remained, Judge Pratt properly granted appellees' motion for summary judgment. Fed. R. Civ. P. 56; *Heyman* v. *Commerce & Indus. Ins. Co.*, 524 F.2d 1317 (2d Cir. 1975).

5. Accordingly, the judgment is affirmed.

6. Appellee Pan American's request for double costs and attorney's fees is denied. *See Fluoro Elec. Corp.* v. *Branford Assocs.*, 489 F.2d 320, 326 (2d Cir. 1973).

IRVING R. KAUFMAN

Irving R. Kaufman,

AMALYA L. KEARSE

Amalya L. Kearse,

Circuit Judges.

LLOYD F. MACMAHON

Lloyd F. MacMahon,

District Judge.

Judgment of United States District Court for the Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 81-2474 (GCP)

AUDREY DEFEX,

Plaintiff,

—against—

PAN AMERICAN WORLD AIRWAYS, INC. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Defendants.

JUDGMENT

A Memorandum and Order of Honorable George C. Pratt, United States Circuit Judge*, having been entered on August 11, 1982, directing the clerk to enter judgment for defendants dismissing the complaint, and in favor of plaintiff and against defendant International Brotherhood of Teamsters in the sum of $500.00, it is

ORDERED and ADJUDGED that judgment is hereby entered for defendants dismissing the complaint, and in favor of

* Of the United States Court of Appeals for the Second Circuit, sitting by designation.

plaintiff and against defendant International Brotherhood of Teamsters in the sum of $500.00.

RICHARD H. WEARE
Clerk of Court

By: JOSIAH KHARJIE
Josiah Kharjie, Deputy Clerk

Dated: Uniondale, New York
August 11, 1982

Memorandum and Order of United States District Court for the Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. CV 81-2474

AUDREY DEFEX,

Plaintiff,

—against—

PAN AMERICAN WORLD AIRWAYS, INC. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Defendants.

APPEARANCES:

JACK B. SOLERWITZ
By David S. Heller
Attorney for Plaintiff
170 Old Country Road
Mineola, New York 11501

TOWNLEY & UPDIKE
By Barbara Roth
Attorneys for Defendant
Pan American World Airways
405 Lexington Avenue
New York, New York 10174

HERBERT K. LIPPMAN
Attorney for Defendant
International Brotherhood of Teamsters
565 Fifth Avenue
New York, New York 10017

MEMORANDUM AND ORDER

PRATT, C. J.:

Plaintiff instituted this action in June, 1981, alleging that she was wrongfully discharged by defendant Pan American World Airways, Inc. (Pan Am), and that defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (IBT), failed to represent her properly in her dispute with her employer. Defendants moved to dismiss the complaint on the ground that plaintiff failed to exhaust the mandatory grievance procedure established in the collective bargaining agreement between IBT and Pan Am. Plaintiff opposed the motion in an affidavit stating that, on or about January 27, 1981 she requested the union to grieve her dispute with Pan Am, and that during the period from January until July, 1981, when she was discharged, she thought that the union was pursuing her grievance. The parties agreed that the only grievance actually filed by plaintiff was dated July 27, 1981, after this litigation was instituted.

In a memorandum and order dated April 14, 1982, the court deferred decision on defendants' motion because of the existence of a genuine issue of material fact with respect to plaintiff's exhaustion of union remedies. Pursuant to FRCP 56(e), the court ordered a hearing to take testimony on this issue to supplement the documents filed on the motion. *See* Wright & Miller, *Federal Practice and Procedure* § 2723. In that order, the court indicated that if plaintiff had reasonably relied on the union to prosecute her grievance, the defense of non-exhaustion would not bar suit against either the union or

the employer, *Schum v. South Buffalo Railway Co.*, 407 F2d 328, 332 (CA2 1974). At oral argument, counsel for all parties had agreed that if testimony concerning plaintiff's reliance upon the union proved necessary, an evidentiary hearing before the court sitting without a jury would be appropriate.

The hearing was held on July 22, 1982. Plaintiff testified that in December 1980 and in January 1981 she received a letter from Pan Am explaining that she would not be allowed to return to work after her medical leave of absence until she provided documentation that she had been evaluated and treated by a certified medical specialist for her reactions to stress, *see* defendants' Ex. L. She testified that she gave a copy of the letter to George Miranda, a union officer, and told him that she wanted to grieve the matter. Miranda told her that he would be in touch with her. Plaintiff also testified on direct examination that she took a copy of the letter to the workers' compensation board because she doubted that she would get her job back through the union and that she hoped to be eligible for disability benefits.

On cross-examination, plaintiff testified that she had filed a handful of grievances during the 26 years she had worked for Pan Am and that she knew that the proper procedure was to obtain a grievance form from the union representative and to complete it and file it either with the representative or the steward. She had followed this procedure for each of her prior grievances. When questioned as to her reasons for not pursuing her claim with the union more vigorously, plaintiff stated that she did not push it, partly because she hoped she would be able to collect disability payments. She said that she thought it was unusual that she was not asked to sign a grievance form and that she suspected she was getting "a shafting".

Norman J. Marsich, the chief steward and local business representative for the union, testified that plaintiff never requested him to file a grievance for her, nor did she ask him to help her in any way after October, 1980. George Miranda testified that plaintiff complained to him concerning her medical leave of absence in early 1981, but that she did not ask him to file a grievance at any time.

The credible testimony indicates that plaintiff did not rely upon the union to file a grievance for her with respect to the conditions of her return to work after her medical leave of absence. Marsich and Miranda both testified, and the court finds as a fact, that plaintiff never asked them to file a grievance on her behalf. Plaintiff admitted that she did not pursue her grievance because she hoped to obtain disability payments, and she further testified that she was familiar with the grievance procedure and that she did consider it unusual that she was not asked to sign any grievance. In light of the testimony of Marsich and Miranda, plaintiff's own testimony, and her familiarity with the grievance procedure, the court finds and concludes that plaintiff did not reasonably rely on the union to prosecute a grievance. Thus, this case does not fall within the exception to the exhaustion requirement for good faith reliance upon the union enunciated in *Schum v. South Buffalo Railway Co., supra*, 496 F2d at 331-32.

Pursuant to the Railway Labor Act, 45 USC § 151 *et seq.*, an employee must exhaust his or administrative remedies prior to bringing an action against an employer. In *Andrews v. Louisville & Nashville R. Co.*, 406 US 320 (1972), the Supreme Court held that the dispute resolution provisions of the RLA are mandatory, *id.* at 324-25, and that both the employee and the carrier have the duty to utilize the dispute settlement procedures provided by the act. *Id.* at 325.

In this case, a collective bargaining agreement existed which complied with the RLA and which provided a detailed procedure for grievances filed in response to disciplinary actions or discharge. Defendants' Ex. A. The court has determined that plaintiff did not utilize these procedures nor did she reasonably rely upon the union to prosecute a grievance for her. Therefore, defendants' motion for summary judgment dismissing the complaint is granted.

Motion for Sanctions Pursuant to FRCP 37.

By motion returnable June 16, 1982, plaintiff moved to compel IBT to answer plaintiff's interrogatories. Plaintiff had served the interrogatories on March 19, 1982, and requested a

response by April 19, 1982. IBT neither complied with the request nor asked for an extension of time. Rather, in early June counsel for IBT informed plaintiff's counsel that he had lost the interrogatories. The answers were finally served on counsel for plaintiff in late June.

On July 7, 1982, counsel for plaintiff and counsel for defendant Pan Am appeared for oral argument on plaintiff's motion for an order granting plaintiff her costs and attorney's fees on the motion to compel. Counsel for Pan Am took no position on the motion. Counsel for IBT did not appear to oppose the motion, and the court reserved decision.

Rule 37(d) of the Federal Rules of Civil Procedure provides that a court shall impose sanctions in the form of expenses and attorney's fees due to the failure of a party to serve answers or object to interrogatories "unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." The court is aware of no such justification or circumstances in this case. Accordingly, plaintiff's motion for expenses and attorney's fees incurred by her motion to compel is granted, and plaintiff is awarded $500 to be paid by defendant IBT.

The clerk is directed to enter judgment for defendants dismissing the complaint, and in favor of plaintiff and against defendant IBT in the sum of $500.

SO ORDERED.

Dated: Uniondale, New York
August 9, 1982.

/s/ GEORGE C. PRATT

George C. Pratt
*U. S. Circuit Judge**

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* Of the United States Court of Appeals for the Second Circuit, sitting by designation.

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